

Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice

BASHARATULLAH SHEENWARY*

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* Basharatullah Sheenwary, LL.M. (2013), University of Washington School of Law. The author is an Associate Professor of Law in the Faculty of Law and Political Science at Nangarhar University, Afghanistan. He would like to thank the Legal Education Support Program - Afghanistan at the University of Washington School of Law for its encouragement and support during the writing of this article, and in particular, the suggestions and comments he received from Elizabeth Baldwin.

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I. INTRODUCTION

Afghan people have a long and enduring history of using customary Alternative Dispute Resolution (customary ADR) to solve their problems and disputes—an approach that continues to thrive in rural Afghanistan today.¹ For many of these rural people, Afghanistan's formal justice system is too expensive, and it appears corrupt and inaccessible in comparison to their customary ADR methods. Customary ADR emphasizes reconciliation over punishment, which resonates with the cultural sensibilities of many rural Afghan tribes. ADR methods also save time and prevent risks associated with travel,² helping disputants avoid the long, costly, and sometimes dangerous trips to urban centers where formal justice is usually conducted.

Despite these clear advantages to customary ADR, these mechanisms have also been known to issue decisions that violate the Afghan Constitution, international human rights law and conventions, and even Afghan codes and

¹ John Dempsey & Noah Coburn, *Traditional Dispute Resolution and Stability in Afghanistan*, PEACE BRIEF (U.S. Inst. Peace, Wash., D.C.), Feb. 16, 2010, at 2.

² *Id.* at 3.

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statutes.³ Most of these violations stem from old traditions, such as revenge homicide or trading women as retribution for serious crimes.⁴ While these violations cannot be tolerated in modern Afghanistan, efforts at rules of law that deny the positive contributions of customary ADR miss an opportunity to facilitate access to justice in rural areas, and they may perpetuate a deep division between the formal and informal systems. The rural people have a deep cultural attachment to resolving conflict through local informal bodies, as these bodies are often led by trusted community elders who understand rural Afghan lives and perspectives. Rural Afghans will not willingly trade this familiarity and tradition for formal justice.

In the United States, the Navajo Nation faced a similar predicament when it created its formal Tribal Courts. The people of the Navajo tribe had ancient ways of settling conflict, mainly through a similar kind of customary ADR.⁵ When tribal judges discovered that the people were not receptive to formal justice, they led an effort to incorporate those traditional ways into the formal system: the Peacemaker Division.⁶ When I was an LL.M. student at the University of Washington School of Law, I had the distinct honor of participating in an Afghan cohort that visited the Navajo Nation.⁷ Through that experience, I gained insight into the harmonious way the Navajo people reconcile formal and informal modes of justice, and I gained inspiration for how Afghanistan might achieve a similar balance.

In light of lessons from the Navajo, this article recommends that Afghan legislators amend the Constitution to acknowledge customary ADR as part of the formal system of dispute resolution, pass a unified statute to regulate ADR, and create a program to train the elders that oversee and supervise the customary ADR bodies. It begins with an introduction to customary ADR in Afghanistan, describing the traditional roles and methods used by the various tribes. Next it describes the Navajo Peacemaker Division and identifies ways that the Afghan formal system of justice can begin to work in harmony with informal systems of ADR. Finally, it offers insight into the kinds of legislative and policy changes that would need to be implemented in order to successfully integrate the two systems.

³ *Id.*

⁴ *Id.*

⁵ See generally RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009).

⁶ PEACEMAKING PROGRAM OF THE JUDICIAL BRANCH OF THE NAVAJO NATION, PLAN OF OPERATIONS 2 (2013), www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf.

⁷ The Navajo Nation stretches through the states of Utah, Arizona, and New Mexico, covering over 27,000 square miles of incomparable beauty. Navajo-land is larger than ten of the fifty states in America. *History*, NAVAJO NATION GOV'T (2011), <http://www.navajonnsn.gov/history.htm>.

II. CUSTOMARY ALTERNATIVE DISPUTE RESOLUTION IN AFGHANISTAN

Afghan people have used customary ADR for hundreds of years, resolving disputes through the assistance and guidance of local elders.⁸ While ADR falls outside governmental control and its orders sometimes violate human rights, more often it provides satisfactory solutions to many common disputes.⁹ This section explains the nature of Afghan ADR, including its cultural and historical origins, its unique attributes, and its positive contributions to justice in Afghanistan. It also exposes problems with some of the traditional punishments and settlements, practices that violate modern standards of justice.

A. *Defining and Understanding Today's Afghan Informal Justice System and its Advantages (ADR)*

Over the last decade, Afghanistan has developed a mixed legal system; in fact, it represents a rather extreme example of legal pluralism by design as well as by default. This official legal framework was a mixture of codified laws derived from Sharia, secular laws, and non-codified Islamic jurisprudence.¹⁰ Additionally, the two systems, official and informal, co-exist and compete with one another.¹¹

Within this informal system, ADR is known by various names, such as the "traditional justice system," "customary law," the "informal justice system," *Jirga*, *Shura*, and other names.¹² These terms may be used interchangeably. In this article, the more general term ADR is simply used to make a distinction between the state formal justice system and non-state informal justice systems.¹³

⁸ Dempsey & Coburn, *supra* note 1.

⁹ NOAH COBURN, INFORMAL JUSTICE AND THE INTERNATIONAL COMMUNITY IN AFGHANISTAN 3 (2003), <http://www.usip.org/sites/default/files/PW84-Informal%20Justice%20and%20the%20International%20Community%20in%20Afghanistan.pdf>.

¹⁰ As explained above, the informal justice system in Afghanistan is an umbrella term that refers to all practices outside of the state laws and courts for solving disputes. See generally Torunn Wimpelmann, *Nexus of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage*, 32 CENTRAL ASIAN SURVEY 406, 407 (2013).

¹¹ *Id.*

¹² Dempsey & Coburn, *supra* note 1; EWA WOJKOWSKA, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE, UNITED NATIONS DEVELOPMENT PROGRAM 47 (2006), <http://www.unrol.org/files/UNDP%20DoingJusticeEwaWojkowska130307.pdf>.

¹³ WOJKOWSKA, *supra* note 12.

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1. *The Trial or Jirga*

Afghanistan's customary or informal legal system, often called *Jirgas*, has a long history. Ancient Aryans used two types of *Jirgas*, *Semity* and *Sabha*, to resolve small and large-scale conflicts.¹⁴ A *Semity* dealt with issues of high significance such as appointing the head of the state and defending national territory.¹⁵ Elders and heads of tribes served as members of the *Semity*. A *Sabha*, on the other hand, resolved minor conflicts at village level.¹⁶

In today's Afghanistan, *Jirgas* continue to play an important role in rural conflict resolution, and Afghans accept *Jirga* decisions as law and enforce judgments against those who refuse to abide by a *Jirga's* decision.¹⁷

The Pashtun *Jirga* has its own particular principles and regulations, which are worth describing here because of the influence of the Pashtun *Jirga* on ADR practices across Afghanistan. The Pashtun *Jirga* was developed by the Pashtun people, a group consisting of more than sixty tribes in Afghanistan and Pakistan.¹⁸ Pashtuns represent the most dominant ethnic group (historically known as Afghans). Pashtuns are known as Pathans and Pukhtuns and speak the Pashto (or Pukhtu) language. They add "Khan" as a suffix with their names. However, many prefer to be titled with their immediate clan or tribe name.¹⁹

Most Afghan citizens are Pashtuns, living in different parts of Afghanistan, and they typically resolve their disputes through Pashtun *Jirgas*. Pashtun *Jirgas* are famous in Afghanistan, even among other ethnic groups, due to proximity with Pashtun neighborhoods and Pashtun tribal influences.²⁰ The *Marakcheen* or *Marakchi* who serve on *Jirgas* are usually well-known men in their communities, known for their ability to make decisions.²¹

Pashtuns have a strong, patriarchal system, in which only men are allowed to be *Jirga* members. To participate in a *Jirga*, women must stay in covered in *hejab*. Although in the rural areas women engage extensively in agriculture and cattle breeding as well as child rearing and other household activities, their

¹⁴ THE INTERNATIONAL LEGAL FOUNDATION, THE CUSTOMARY LAWS OF AFGHANISTAN 7 (2004), http://www.usip.org/sites/default/files/file/ilf_customary_law_afghanistan.pdf [hereinafter CUSTOMARY LAWS].

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Id.* See also Wimpelmann, *supra* note 10, at 32.

¹⁸ ALI WARDAK, JIRGA- A TRADITIONAL MECHANISM OF CONFLICT RESOLUTION IN AFGHANISTAN 3 (2003), unpan1.un.org/intradoc/groups/public/documents/apcity/unpan017434.pdf.

¹⁹ *Id.*

²⁰ HASSAN M. YOUSUFZAI & ALI GOHAR, TOWARDS UNDERSTANDING PUKHTOON JIRGA 24 (2005).

²¹ *Id.*

role in a traditional *Jirga* are very limited. It is not common for a woman to bring her own dispute. In the usual process, a male family member—father, uncle, brother, or husband—would bring a woman’s dispute to the elders, otherwise known as the “white beards,” “*Jirga Mar*”, or *Marakcheen*.²² If she is a widow, or if she has no man to act for her, the elders and white-beards may give permission for her to proceed on her own; however, young, unmarried women are never given this permission.²³

Rural Afghan people tend to agree that the elders in their communities have the necessary ability and experience to resolve disputes among different parties and make appropriate decisions.²⁴ Therefore, these communities continue to call on elders to solve their problems.²⁵ Notably, the members of a *Jirga* are usually volunteers, as they are not allowed to take remuneration for their work.²⁶ In this way, serving on a *Jirga* is a community service.

When a dispute arises and a *Jirga* is approached to resolve it, *Jirga* members go to an isolated or specific chamber, a big room, or a local mosque.²⁷ All parties to the dispute have equal rights when the case is discussed and argued, regardless of their social status.²⁸ Traditionally, before addressing the issue, every member begins with a short story, a proverb, or an example related to the case. After that, every individual is eligible to discuss and explain a specific point of view and make suggestions regarding potential solutions. Traditionally, “useless or offensive talk is prohibited”²⁹ in a *Jirga*. Moreover, *Jirga* members are expected to be impartial. If it is shown that one of the *Jirga* members is paid or bribed, the parties can replace that member.³⁰

The duration of *Jirga* proceedings depends on the nature of a case. Some issues require days or weeks of discussion—some matters can be resolved within a day, such as misdemeanors and civil cases.³¹ Surety, either cash or property, is taken at the beginning of the session from the parties and deposited

²² *Jirga* is an old custom with unmatched influence on conflict resolution in the Pukhtoon belt of Pakistan and Afghanistan. It is a name given to the model, in which a Pukhtoon society operates, to undertake issues between individuals and between communities, to address concerns, and to look for solutions acceptable to all stakeholders.

YOUSUFZAI & GOHAR, *supra* note 20, at 17.

²³ DEBORAH J. SMITH, COMMUNITY-BASED DISPUTE RESOLUTION PROCESSES IN NANGARHAR PROVINCE 42 (2009), <http://www.areu.org.af/Uploads/EditionPdfs/941E-Community-Based%20Dispute%20Resolution%20in%20Nangarhar%20CS%202009.pdf>.

²⁴ CUSTOMARY LAWS, *supra* note 14, at 8.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CUSTOMARY LAWS, *supra* note 14, at 8.

³¹ *Id.*

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with a third party. This surety is known as *Machilgha* or *Baramta* and its value depends on the case.³²

The practices of *machilgha* and *baramta* are usually invoked when there is concern about the parties' willingness to agree to enforceability of the *Jirga's* announcements.³³ All tribes accept this kind of legal guarantee. When the parties accept the *Jirga* announcement or decision, *machilgha* is required of the parties; otherwise, the party may not be allowed to receive its cash or property if its behavior violates the *Jirga's* decision.³⁴

The rules and practices of *Jirgas* are part of an oral tradition. While there is no formal system of precedent, for centuries opinions have been transferred from one generation to another as a customary law.³⁵ These decisions contain general rules and regulations, and are viewed as mandatory precedent in the Afghan alternative dispute resolution system, as *Jirga* members rely on past decisions to guide their approach to resolving conflicts. Ahmadzai tribe's *Nerkhs* and *Tselays* are greatly regarded as credible as it is one of the largest Pashtun tribes and has very mature *Jirga* men. Therefore, other tribes rely on the decisions made in *Jirgas* by this tribe.³⁶ In practice, all other tribes rely on these *Nerkhs* assigned by Ahmadzai tribe.³⁷

2. *Takhm* or Appeal

If a party is not satisfied with a *Jirga's* decision, it may request another *Jirga* to review the decision.³⁸ The decision of the second *Jirga* is not final and either party may review it in a third and final *Jirga* known as *Takhm*.³⁹

The *Takhm* is the ultimate arbiter of *Jirga* decisions. If one of the parties disputes the outcome and refuses to comply with the *Jirga's* order, the tribe can impose punishment on the refusing party. These punishments range from simple cash fines to more extreme and even unconstitutional or inhumane measures, like burning the house of the party who refuses to comply with the *Jirga's* order.⁴⁰ These more extreme punishments are discussed in greater detail in the next sections.

In general, Pashtun tribes accept *Jirga* decisions as authoritative under *Pashtunwali*, which is the code of honor that most Pashtun tribes use for

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ CUSTOMARY LAWS, *supra* note 14, at 9.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

resolving their conflicts.⁴¹ Pashtuns greatly respect *Jirga* and consider it the main foundation for *Pashtunwali*.⁴² Pashtuns strongly agree with Khoshal Khan Khatak: “[a] community who knows that plenty of *Jirgas* will never undertake something not decided by a *Jirga*.”⁴³ According to Pashtuns, in the absence of a strong central government the *Jirga* system was successfully functional and solved national and local conflicts.⁴⁴ The absence of a central government contributed to the further development and continuation of this informal customary practice to date.⁴⁵

3. Enforcement

When two parties agree that a decision of a *Jirga* seems reasonable, the decision is enforced by *Arbakai*, a traditional policing organization.⁴⁶ In ancient Aryan tribes, the *Arbakai* led groups of fighters in wartime and maintained law and order in peacetime.⁴⁷ Today, they enjoy immunity, and no one can refuse their orders in their communities as they receive orders from a commander.⁴⁸ The *Arbakai* organization sets out rules and punishments, and those who disobey these rules are punished.⁴⁹

In addition, the *Arbakai* works voluntarily, implementing decisions of *Jirgas*, maintaining law and order, and protecting the tribal territory.⁵⁰ This power is somewhat distinct from the power of the Afghan militia, hired by private security companies, or from the police or army, hired by the government.⁵¹ Instead, *Arbakai* do not receive a salary; they are unpaid and are working for a specific period of time. In addition, the Afghan militias work in the territory of the Afghan Government, and they are obliged to implement the Afghan laws, but *Arbakai* work voluntarily and they implement the tribe’s decisions in a particular territory.⁵²

⁴¹ *Id.* at 15.

⁴² CUSTOMARY LAWS, *supra* note 14, at 9.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ YOUSUFZAI & GOHAR, *supra* note 20, at 21.

⁴⁸ CUSTOMARY LAWS, *supra* note 14, at 10.

⁴⁹ *Id.*

⁵⁰ MOHAMMED O. TARIQ, TRIBAL SECURITY SYSTEM (ARBAKAI) IN SOUTHEAST AFGHANISTAN 3-4 (2008), <http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/op/OP7Tariq.pdf>.

⁵¹ *Id.*

⁵² *Id.*

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4. *Composition, Jurisdiction, and Authority of Informal Mechanisms*

As mentioned above, both sides to a dispute work together to select *Jirga* members. Usually, these members are influential men in the tribes—trusted to produce a decision that seems unbiased to the parties.⁵³ These members are usually elders who parties individually select, and they can solve problems from marital disputes to murder and other severe crimes. The elders also supervise any arguments that communities find more persistent, such as land and water-use cases, and they usually make their decisions in light of social value and community contribution.⁵⁴

Typically, parties choose elders who have a background and familiarity with the subject matter of the dispute, having knowledge about the rules that apply to a specific case.⁵⁵ For example, if a case has religious dimensions, it is crucial to select religious elders for resolving that dispute. There is a significant amount of discussion about the process when the elders consider the case: who will be involved in making the resolution, the limitations of the resolution, and the extent to which the decision will be binding.

Notably, the *Jirga* process cannot simply be translated into English terms like “mediation” and “arbitration.”⁵⁶ While this process shares many characteristics with mediation and arbitration, it has many differences too.⁵⁷ Parties begin this process by presenting their claims. After that, there is time for negotiation and discussion before the parties hand over the adjudicating authority, known as *Waak*, to the *Jirga* members to settle the dispute.⁵⁸

Another difference is that while the decision of a dispute resolution council is generally considered binding, in practice there may be room for a decision to be disputed and negotiated, unlike in binding arbitration where parties expect to be bound by the decision in advance.⁵⁹ This is particularly true in Pashtun areas, where *Jirgas* often require a sum of money called *Machalga*, which is to be collected after both sides have formally granted

⁵³ COBURN, *supra* note 9, at 16. See also, NOAH COBURN & JOHN DEMPSEY, INFORMAL DISPUTE RESOLUTION IN AFGHANISTAN 2–3, 7 (2010), <http://www.usip.org/sites/default/files/sr247.pdf>; THOMAS BARFIELD, AFGHAN CUSTOMARY LAW AND ITS RELATIONSHIP TO FORMAL JUDICIAL INSTITUTIONS 9 (2003), <http://www.usip.org/sites/default/files/file/barfield2.pdf>.

⁵⁴ COBURN, *supra* note 9, at 16.

⁵⁵ *Id.*

⁵⁶ *Id.* at 17.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ THE LIAISON OFFICE, LINKAGES BETWEEN STATE AND NON-STATE JUSTICE SYSTEMS IN EASTERN AFGHANISTAN, 4, 16–17 (2009), <http://www.usip.org/sites/default/files/ROL/state-and-non-state-justice-systems-in-eastern-Afghanistan.pdf>.

Waak to the *Jirga* to resolve the dispute.⁶⁰ The *Machalga* is meant to ensure that both parties adhere to the decision of the group, because it is forfeited if either party does not accept the *Jirga*'s decision or breaches it at a future date.⁶¹ In some instances, this may have unintended consequences, particularly in areas where *Jirga* members can keep the money if a resolution is not achieved. Here individuals sometimes complain that the *Machalga* can actually discourage *Jirga* members from reaching a just resolution between the parties.⁶² As a means of personal enrichment, the *Jirgamaran* (the members of the *Jirga*) would intentionally reach a decision that they knew one or both of the parties would not abide by solely to gain legitimate claim to the *Machalga*.⁶³ This practice may be prevented, however, if the *Machalga* is given to the community more generally and not to individual adjudicators.⁶⁴ In practice, however, it is rare to find cases in which *Machalga* has been given and the dispute has not been successfully resolved, since the submission of *Machalga* publicly demonstrates a willingness on the part of both sides to negotiate.⁶⁵

Selecting a *Jirga* can take several days.⁶⁶ When all participants agree on the composition and authority of the elders, then the *Jirga* members can begin their meetings and work to resolve the dispute. Notably, after this long selection process, a *Jirga* may move quickly to resolve disputes, often within one or two hours, especially if *Jirga* members are knowledgeable community participants who have substantial experience.⁶⁷

B. *Afghan Cultural Values and Pashtunwali Compared with Principles of Restorative Justice*

One of the key ways that *Jirga* decisions differ from formal court decisions is that elders usually try to focus on reasonable, equal outcomes—outcomes that are good for both sides—in this way, they attempt to maintain social harmony, not find winners and losers.⁶⁸ This equitable, *Pashtunwali* approach is more similar to the concept of restorative justice than retributive

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ LINKAGES BETWEEN STATE AND NON-STATE JUSTICE SYSTEMS IN EASTERN AFGHANISTAN, *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

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justice.⁶⁹ There are three propositions to summarize the restorative justice model: 1) crime is not a conflict between an individual and the state but rather a conflict between individuals which results in injuries to communities and offenders; 2) the criminal justice process is aimed to reconcile the parties and repair the injuries that resulted from the offense; and 3) the government should not control the process and instead it should facilitate active participation of the victims, offenders and communities.⁷⁰ The goal of restorative justice is that "the community seeks to restore peace between victims and offenders, and to reintegrate them fully into itself; the goals for victims can [be] expressed as healing and for offenders as rehabilitation."⁷¹ In general, it is less important to focus on the past than resolving future problems.⁷²

This same concept of rehabilitation and forgiveness is reflected in the practice of the Pashtun *Jirga*. For example, instead of serving time in prison, a wrongdoer may be asked to pay *poar* (blood money), and a victim may be asked to forgive the wrongdoer.⁷³ Across Afghanistan, there are several cultural values or key concepts that define informal justice roles in the Afghan society, such as *islah* (reconciliation) and *Pashtunwali*.⁷⁴ These cultural values are explained in more detail below.

In fact, one of the most valued principles in *Pashtunwali* is *islah* (meaning reconciliation). The Holy Quran explains that when "two parties among the believers fall into mutual fighting, make peace (*islah*) between them."⁷⁵ This concept does not only simply resolve a conflict but also impliedly promotes social harmony and justice.⁷⁶

One of the interpretations of *islah* is to practice an informal dispute resolution justice system in some disputes, such as *Tazeer* (discretionary punishment), outside of the formal justice system. Usually, the elders, who are scholars or religious individuals, refer to these religious and social values when they want to solve disputes, and they encourage the participants to accept certain decisions of elders to the extent of religious and social values as a social pressure.⁷⁷

The informal justice system of Afghanistan originated in rural areas.⁷⁸

⁶⁹ Marianne O. Nielsen, *Navajo Nation Courts, Peacemaking and Restorative Justice Issues*, 44 J. LEGAL PLURALISM & UNOFFICIAL L. 105, 112 (1999).

⁷⁰ *Id.*

⁷¹ *Id.* at 113.

⁷² *Id.*

⁷³ CUSTOMARY LAWS, *supra* note 14, at 10.

⁷⁴ COBURN, *supra* note 9, at 14–15.

⁷⁵ Ayah 9 of Al-Hujurat Surah, *The Holy Quran*, Chaptar, *Al-Hujurat*, verse 9.

⁷⁶ COBURN, *supra* note 9, at 14.

⁷⁷ *Id.*

⁷⁸ BARFIELD, *supra* note 53, at 1.

Inhabitants of the remote areas in the mountains and deserts remained geographically outside the bounds of state control, which meant that they ran their own affairs according to local cultural norms; this tradition was especially strong among the Pashtun tribes. Absence of wealth and marginal locations made these areas “unprofitable for the Afghan state to administer.”⁷⁹ Therefore, for many years, state control in these regions was often “indirect or even non-existent.”⁸⁰ The origin of law was based on the community agreement to preserve relationships and solve disputes.⁸¹ The Pashtun tribe played an especially important role in developing the customary law that characterizes this uniquely Afghan system of ADR.

Pashtuns are greatly identified with being born through Pashtun ancestry, and they place a high importance on speaking the Pashto language.⁸² From a Pashtun perspective, being a “real Pashtun” means to “do Pashto,” which is known as *Pashtunwali*.⁸³ *Pashtunwali* is a traditional code for whole parts of life.⁸⁴ Thus, as Barfield observes, “it is more than a system of customary laws, it is a way of life that stresses honor above all else, including the acquisition of money or property.”⁸⁵ Although Pashtuns were originally one organized tribe, related by patrilineal descent, they have since been divided into several clans and small tribes.⁸⁶ Most Pashtuns are Sunni Muslims; therefore, they have mixed tribal law with Islamic regulations, and for the most part, these two sources of customary law are inseparable and support one another.⁸⁷ But sometimes these laws conflict, especially over human rights and criminal cases.⁸⁸

While the most developed and complete customary law code is the *Pashtunwali*, other ethnic groups in rural Afghanistan have similar ADR traditions.⁸⁹ Generally, other ethnic groups do not call these bodies *Jirgas*; however, they have similar institutions like *rishsafid*, a Persian word for “white beard” or “elders,” and *aqsaqal*, a Turkish word for the same.⁹⁰ These *rishsafid* and *aqsaqal* figures are important political leaders who serve as

⁷⁹ *Id.* at 3.

⁸⁰ *Id.*

⁸¹ See COBURN, *supra* note 9, at 76–77.

⁸² BARFIELD, *supra* note 53, at 2. See generally LUTZ RZEHA, DOING PASHTO: PASHTUNWALI AS THE IDEAL OF HONORABLE BEHAVIOR AND TRIBAL LIFE AMONG THE PASHTUNS 2 (2011) (explaining the cultural identity of Pashtun people and the dimensions of *Pashtunwali*).

⁸³ BARFIELD, *supra* note 53, at 4.

⁸⁴ *Id.* at 1.

⁸⁵ *Id.* at 4–5.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 5–6.

⁸⁹ BARFIELD, *supra* note 53, at 25.

⁹⁰ *Id.*

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mediators in villages. Like Pashtun groups, these tribes also have crimes like blood disputes and private revenge, but systems of ADR are less commonly used in non-Pashtun areas.⁹¹ People in these areas are more inclined to use formal courts to solve their disputes, particularly where a disputant is not a member of an ethnic group; nonetheless, ADR continues to be the dominant dispute resolution mechanism across rural Afghanistan.⁹² As a whole, the model of non-Pashtun customary law is somewhat similar to Pashtun customs, but non-Pashtun customary law does not originate from Afghanistan.

C. *Traditional ADR Remedies that Conflict with Modern Standards of Justice*

The following subsections explain some of the problematic ways that traditional forms of ADR, like *Pashtunwali*, solve disputes or rectify injuries. These ancient remedies respond to issues like homicide, adultery, rape and abduction, and personal injury; remedies like these have led to criticism of the Afghan ADR systems.

1. *Revenge Homicide*

It was an old custom of *Pashtunwali* that if a person committed murder, his or her paternal relatives would face a risk of revenge attacks by the innocent victim's paternal relatives.⁹³ Historically, this was considered a legitimate form of revenge—to kill relatives of the murderer's paternal family.⁹⁴ During the 20th century, this custom changed, and murderers were considered to be a legitimate target of revenge.⁹⁵ If the murderer fled from the area to hide in another place or foreign country, the murderer's older son or brother "were considered acceptable substitutes" and could be killed through revenge homicide.⁹⁶

Notably, customary ADR also has methods for preventing further killing, but these methods may also violate human rights. Typically, when murder occurs, the elders of a community suggest that the families of the murderer

⁹¹ *Id.*

⁹² *Id.* See also, Amy Senier, *Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law*, FLETCHER SCH. ONLINE J. ISSUES RELATED TO SW. ASIA AND ISLAMIC CIVILIZATION, Spring 2006, at 6, <http://fletcher.tufts.edu/Al-Nakhlah/Archives/~media/Fletcher/Microsites/al%20Nakhlah/archives/2006/senier.ashx>.

⁹³ See e.g., BARFIELD, *supra* note 53, at 5–7; WOJKOWSKA, *supra* note 12, at 32.

⁹⁴ BARFIELD, *supra* note 53, at 5–7; WOJKOWSKA, *supra* note 12, at 32.

⁹⁵ BARFIELD, *supra* note 53, at 5–7; WOJKOWSKA, *supra* note 12, at 32.

⁹⁶ BARFIELD, *supra* note 53, at 14.

and the murdered come and make a *Jirga* to resolve the conflict.⁹⁷ In the alternative, the families themselves may request a *Jirga*, especially when there has been a long period of feuding between families.⁹⁸ Especially when a family is too poor or socially too weak to carry out revenge on its own, that family may be inclined to resolve their conflict through a *Jirga*.⁹⁹

Once the *Jirga* meets, it determines damages, known as “blood money.”¹⁰⁰ This amount has to be paid by the murderer’s family to the victim’s family, along with two sheep as a *nanawati*, a shame payment and an apology.¹⁰¹ In addition, the victim’s family is given an unmarried girl, or girls, from the murderer’s family. These girls are then married to siblings of the murder victim. This practice is known as *baad*.¹⁰² While this old practice clearly violates women’s rights under international and Afghan law,¹⁰³ rural Afghan people have traditionally viewed it as a useful means for restoring peace. It is meant to replace the life that was lost, and uniting the families through marriage and preventing further hostilities.¹⁰⁴ In fact, elders have even encouraged families to exchange additional women, the sisters or daughters of both sides are exchanged in marriage. Of course, this practice treats women as property to be traded and sold, which violates international law, as well as Afghan formal law.

⁹⁷ See, e.g., BARFIELD, *supra* note 53, at 14–16; WOJKOWSKA, *supra* note 12, at 32.

⁹⁸ BARFIELD, *supra* note 53, at 14.

⁹⁹ *Id.*

¹⁰⁰ WARDAK, *supra* note 18, at 10–11.

¹⁰¹ See *id.* at 10–12; I also bring my own personal knowledge of the rules of *nanawati* to this discussion.

¹⁰² Alissa J. Rubin, *For Punishment of Elders’ Misdeeds, Afghan Girl Pays the Price*, N.Y. TIMES, Feb. 16, 2002, <http://www.nytimes.com/2012/02/17/world/asia/in-baad-afghan-girls-are-penalized-for-elders-crimes.html>.

¹⁰³ The practice of *baad* constitutes a clear violation of women’s rights under both international law and Afghan domestic law. For example, under Article Twenty-Six of the Afghan Constitution, crime is framed as a personal action; as such, the prosecution, arrest, and detention of an accused and the execution of penalty cannot affect another person. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, January 26, 2004, art. 26 (Afg.). Likewise, under Article 33, ¶ 1 of the 1949 Geneva Convention IV, “[n]o protected person may be punished for an offence he or she has not personally committed.” Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 33, ¶ 1, Aug. 12, 1949, 75 UNTS 287. Finally, Article 5(3) of the 1969 American Convention on Human Rights provides: “Punishment shall not be extended to any person other than the criminal.” American Convention on Human Rights, art. 5(3), November 22, 1969 [hereinafter Pact of San José, Costa Rica].

¹⁰⁴ BARFIELD, *supra* note 53, at 14.

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2. *Adultery, Rape, and Abduction*

Under customary law, sexual misbehavior is considered a crime against family honor.¹⁰⁵ Pashtun tradition takes such violations seriously, and unfortunately, some of the punishments and damages for these offenses can be harsh and, like *baad*, they can violate human rights—especially for women.¹⁰⁶ As Barfield explains, “a victim’s family, for example, may have the right to kill seven members of the offender’s family in revenge for adultery, abduction or rape.”¹⁰⁷ If adulterers are caught in bed together, both are put to death. In fact, according to tradition, if only one of the two adulterers are killed, the killing would be considered illegitimate.¹⁰⁸ In the case of forcible rape or if a woman reports that she has been sexually assaulted, usually only the man is likely to be killed, but of course, the case against the man must be proven.¹⁰⁹

When an unmarried girl runs away with a man without her family’s permission, honor killings may also follow, or for forcible abductions.¹¹⁰ In these cases, the couple often runs away from the area to find *nanawati*, sanctuary, in another village or tribe.¹¹¹ They may later try to restore their reputation through *pour* (indemnity), a tradition that involves giving two sheep to the affected families as a shame payment.¹¹² In order to offer apology, the man’s family must give two women to the offended family as wives for the men in the family.¹¹³ When a married woman is abducted, the man and woman both are considered guilty, and are similarly liable to death by the offended family.¹¹⁴

3. *Personal Injury and Monetary Compensation*

There are complex *Pashtunwali* rules governing monetary compensation for personal injury. For example, historically, the compensation of human life was set at 60,000 Afghani, now AFs.¹¹⁵ The human body was divided into four parts—eyes, feet, hands, and the rest of the body—each worth 15,000

¹⁰⁵ *Id.* at 17.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; ALEF-SHAH ZADRAN, SOCIOECONOMIC AND LEGAL-POLITICAL PROCESSES IN A PASHTUN VILLAGE, SOUTHEASTERN AFGHANISTAN 272 (1977).

¹⁰⁸ BARFIELD, *supra* note 53, at 17.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ BARFIELD, *supra* note 53, at 17.

¹¹⁵ *Id.* at 22.

AFs.¹¹⁶ In the 1970s, inflation lowered the value of the AF, which made 60,000 AFs feel insufficient, but it was found that the proportional principle still applied and 15,000 AFs per major body part continued to be the standard.¹¹⁷ In addition, if a person were threatened by knife or rifle, the offender would have to pay 1,000 AFs as a compensation penalty.¹¹⁸

Despite the deep cultural roots and the legal complexity of ADR in Afghanistan, decisions from typical ADR bodies have no legal effect in courts, except under special circumstances.¹¹⁹ Nonetheless, Afghan people continue to choose ADR because, despite some of the obviously troublesome practices that violate human rights, there remain many remedies and practices that work well and should be maintained. For many Afghan people, the formal justice system is too expensive, corrupt, and inaccessible. And while formal courts may emphasize right and wrong, winner and loser, ADR emphasizes reconciliation over punishment, an approach that resonates with many rural Afghan tribes. ADR methods also save time, helping disputants avoid the long, costly, and sometimes-dangerous trips to urban centers where formal justice is usually conducted. Afghans simply need a way to harmonize the systems—keeping the good and reforming or eliminating the bad.

The next part explains how Afghanistan can learn from the Navajo Nation's approach to harmonizing formal and informal systems of justice—enabling preservation of valued customary practices and implementation of a formal system.

III. THE NAVAJO NATION AND ITS PEACEMAKING DIVISION

The Navajo Nation, a sovereign nation of American Indian origin, settled over a 25,000 square mile territory in Arizona, New Mexico, and Utah.¹²⁰ The population of this area is over 220,000.¹²¹ The Navajo Nation has three separate branches of government: the Navajo Nation Council enacts the laws; the Executive Branch executes those laws; and the Navajo Nation Courts interpret those laws.¹²² In addition to this standard, formal structure, the Navajo Nation formalized a relationship between its traditional American

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ WOJKOWSKA, *supra* note 12, at 9.

¹²⁰ Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 298 (2000).

¹²¹ *Id.*

¹²² *See id.*

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Indian justice system and its tribal court.¹²³ This traditional system, housed in the Peacemaker Division (the name was changed from peacemaker court), incorporated general principles of peacemaking—essentially ADR—and was incorporated into the Navajo Nation Tribal Court.¹²⁴

In 1980, Navajo judges realized the need to find an alternative to the western style of adjudication, as it was not suited to their ways of life.¹²⁵ Public concerns revealed that many problems in the Navajo court system resulted from incompatibility and inconsistency between Navajo justice and western form of litigation in the courts.¹²⁶ While addressing these concerns, the Navajo judges decided in favor of the Navajo justice system, as it was inexpensive, speedy, and simple.¹²⁷ The Navajo judges restored traditional “Diné peacemaking” in 1982, and developed those practices to the currently known “Peacemaker Court” or the Navajo Peacemaking Division.¹²⁸

The Navajo Nation expresses traditional justice through Peacemakers, and the Peacemaking Division does not follow case law or statutory structure and procedures.¹²⁹ It has rather gradually developed over centuries from various forms of ADR, tribal cultures, and religions.¹³⁰ The Navajo Peacemaking system is based on a restorative justice model.¹³¹

A. General Principles of Peacemaking

1. Fundamental Laws of the Diné

The Navajo Nation Council acknowledged and incorporated laws of the Diné on November 1, 2002, recognizing four specific fundamental areas of law: traditional law, customary law, natural law, and common law.¹³² The Diné “court of law and equity” is the traditional dispute resolution process, which is called *Hózhji nahat’á*, meaning reparation or mending of arguments

¹²³ Paul Clark, *Restorative Justice and ADR: Opportunities and Challenges*, 44 ADVOCATE 13, 14 (2001).

¹²⁴ NAVAJO NATION CODE ANN. tit. 1, § 203 (2010).

¹²⁵ RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 39 (2009).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Kenneth Bobroff, *Diné Bi Beenahaz’áanii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 TRIBAL L. J. (2004–2005).

through harmony.¹³³ Diné Peacemaking is an adaptation of the traditional process of the Navajo Nation, led by Navajo holy people.¹³⁴ Diné has application to all features and aspects of Navajo life.¹³⁵ Participation is voluntary as this process is a “consensual agreement” between the disputant parties for resolving the dispute.¹³⁶ The parties are invited to the meeting by members of the Diné.¹³⁷ The parties and members talk and discuss the dispute to make a decision about the dispute while the solutions are reached with the consent of parties.¹³⁸ During the process of dispute resolution, the peacemakers use the Navajo National Council’s enacted laws.¹³⁹

2. *Healing Concept*

The ultimate purpose of the Navajo Nation’s judicial practices is to heal and restore relations between the disputant parties, which is better described by the concept of “*hozhonahashlii*.” Peacemaking focuses on resolving problems through initiating communication between the parties.¹⁴⁰ Peacemaking builds relationship and respect among the parties.¹⁴¹ The process is initially conducted by the parties, and it is concluded through group discussion.¹⁴² Unlike the case law system, the peacemaking does not impose punishment and is aimed to restore the injured one and rehabilitate the offender.¹⁴³

3. *K’é Concept*

“*K’é Bee ilnidá’anish*,” is the fundamental concept of Diné, which is the foundation of Diné peacemaking, which is translated as “working together

¹³³ JUDICIAL BRANCH OF THE NAVAJO NATION, PEACEMAKING: A GUIDE TO THE PEACEMAKING PROGRAM OF THE NAVAJO NATION 1, 1 (2004), <http://www.navajocourts.org/Peacemaking/peaceguide.pdf> [hereinafter PEACEMAKING GUIDE]. See also NAVAJO NATION CODE ANN. tit. 1 § 201 (2010).

¹³⁴ PEACEMAKING GUIDE, *supra* note 133, at 1.

¹³⁵ Navajo Nation v. Arviso, 8 Navajo Rptr. 697 (Nav. Sup. Ct. 2005).

¹³⁶ PEACEMAKING GUIDE, *supra* note 133, at 1. See also NAVAJO NATION CODE ANN. tit. 1 § 201 (2010).

¹³⁷ PEACEMAKING GUIDE, *supra* note 133, at 1.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Adam Mendelowitz, *Restorative Justice: Integrating Peacemaking into Modern America*, 7 (2008), <http://www.pokagon.com/sites/default/files/assets/group/tribal-court/2014/mendelowitz-law-review-1348.pdf>.

¹⁴¹ PEACEMAKING GUIDE, *supra* note 133, at 1. See also Clark, *supra* note 123, at 15.

¹⁴² PEACEMAKING GUIDE, *supra* note 133, at 1.

¹⁴³ *Id.*

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through relations.”¹⁴⁴ It, however, has other meanings including relationship, respect, and responsibility.¹⁴⁵ The Navajo Peacemaking Guide explains the following about *K’é*: “*K’é* enables people’s minds to reinforce, respect, communicate, and promote traditional planning and healing ways. *K’é* is the foundation of *Hózh Náhoodleel* because it is practiced in daily life and activities.”¹⁴⁶

In her study of clan ties among the Navajo, Cathleen Willging interviewed Irene, a clan member and Navajo psychologist, who summarized the meaning of *K’é* like this:

K’é is kind of like being a Navajo....It’s who you are as a person. It’s always a part of you. It’s how you interact with another person; how you respect that person; how you communicate with that person. It’s being polite, being respectful, and being cordial. It’s just a total thing that goes with it. And that’s always there. I’m very conscious of that....¹⁴⁷

The *K’é* concept is very reliable to Navajo elders because the concept supports communication among people and provides opportunity to bring family members to talk to one another.¹⁴⁸ According to Diné, communication is the key to bringing harmony to the nation.¹⁴⁹ The Diné survived and lived together, in the absence of revenue, just because *K’é* promoted peace of mind for the self and others. This way of living is believed to have formed and sustained numerous values, such as traditional values of identity, a way of life, beliefs, language, culture, arts, ceremonial, and resources.¹⁵⁰

An attempt has been made to incorporate many of these principles, which have been used to find a solution to a conflict between the traditional processes and the provisions of the peacemaker guidelines.¹⁵¹

¹⁴⁴ PEACEMAKING GUIDE, *supra* note 133, at 2. See generally AUSTIN, *supra* note 125, at 137–82.

¹⁴⁵ PEACEMAKING GUIDE, *supra* note 133, at 2.

¹⁴⁶ *Id.*

¹⁴⁷ CATHLEEN E. WILLGING, *Clanship and K’é: The Relatedness of Clinicians and Patients in a Navajo Counseling Center*, 31 *TRANSCULTURAL PSYCHIATRY* 5, 6 (2002).

¹⁴⁸ PEACEMAKING GUIDE, *supra* note 133, at 2. See generally AUSTIN, *supra* note 125, at 137–182.

¹⁴⁹ PEACEMAKING GUIDE, *supra* note 133, at 2.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

4. *Peacemakers*

Members of the Peacemakers are certified by the Peacemaking Program.¹⁵² Not everyone is eligible for its membership and only those people who have a good reputation within their communities for justice, wisdom, respect, and planning ability, can become its members.¹⁵³ Peacemakers attend different stages of trainings such as introductory, intermediate, and continuation periods of training appointment.¹⁵⁴ Once they complete intermediate level training, peacemakers take the oath of the Peacemaking Program Office and then may get a case.¹⁵⁵

There is no limitation on individuals and whoever is respectful, and has good reputation of honesty, is allowed to render his/her service as a peacemaker.¹⁵⁶ For example, Navajo Nation governmental officials, officers, or employees, such as members of the Navajo Nation Council, chapter government officials, or executive and legislative Branch officials can be peacemakers.¹⁵⁷ However, members of the Navajo National Judicial Branch such as judges, justices, and other employees are prohibited from becoming peacemakers because they may not work consecutively in both fields.¹⁵⁸

IV. THE RESTORATIVE JUSTICE PARADIGM AND PEACEMAKING

Similar to Afghan ADR practices, Navajo Peacemaking incorporates principles from restorative justice.¹⁵⁹ The Navajo have historically turned to principles of restorative justice because it uses a process that respects the “feelings and humanity of both the victim and the offender.”¹⁶⁰ The Navajo Nation has adapted this approach because both the victims and offenders take part in the healing process and find an opportunity to interact with and understand one another.¹⁶¹ Occasionally, this knowledge may lead to

¹⁵² PEACEMAKING GUIDE, *supra* note 133, at 9. *See also* NORTHERN ARAPAHO CODE tit. 7, §201 (2004).

¹⁵³ PEACEMAKING GUIDE, *supra* note 133, at 9.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 15.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See generally* Nielsen, *supra* note 69, at 112; Karen Delfau & Nicholas Duff, *Restorative Justice: Contextual and Cultural Considerations*, SYNEXE, Aug. 2011, at 1–3 (explaining how the Navajo Nation uses restorative justice).

¹⁶⁰ Nielsen, *supra* note 69, at 112 (quoting DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 25 (1997)). *See generally* Delfau & Duff, *supra* note 159, at 1–3.

¹⁶¹ Nielsen, *supra* note 69, at 112.

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empowering the victim to overcome lasting fear associated with the offense.¹⁶² This process also helps to understand offenders who may provide more information on factors that contributed to the offense.¹⁶³

The Peacemaking program and mediation are two distinct programs.¹⁶⁴ The Peacemaking is practiced worldwide in formal systems while mediation is a one-time service with associated fees. Nielsen emphasizes this difference, explaining that “[p]eacemaking is primarily a way of life that fulfills one's sense of responsibility to the community.”¹⁶⁵

Religiously, Native Americans believe that peacemaking is a spiritual system.¹⁶⁶ Prayers connect the participants to a spiritual world and remind them that they must use their “sacred mind and sacred language” for resolving problems that they face.¹⁶⁷ In comparison, mediation is more about individuality and material achievement.¹⁶⁸

V. RELATIONSHIP BETWEEN PEACEMAKING AND FORMAL COURTS

Although there are no judicial procedures to follow in the peacemaking and resolutions process, there are some situations in which the court issues an order to give full effect to peacemakers' agreements and resolutions of parties.¹⁶⁹ The court also looks into conformity of the peacemakers' conduct with the rule of law. For the uniformity of process, the following process is established which guides the parties and peacemakers in the process of getting judicial review and recognition of a peacemaking resolution.¹⁷⁰

First, parties must file an application in the district court to recognize a peacemaking agreement together with the peacemaking agreement certified by the Peacemaking program and a copy of the necessary documents.¹⁷¹

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Nielsen, *supra* note 69, at 113.

¹⁶⁶ *Id.* at 110–11.

¹⁶⁷ *Id.* at 113 (quoting Bluehouse, personal communication, July 24, 1998).

¹⁶⁸ *Id.*

¹⁶⁹ PEACEMAKING GUIDE, *supra* note 133, at 17.

¹⁷⁰ *Id.*

¹⁷¹ A pleading which sets forth a claim for relief, including an original complaint, counterclaim, cross-claim, or third-party claim, shall contain:

(1) A short and plain statement for the court's jurisdiction, unless the court's jurisdiction is established by prior pleadings; (2) A short and plain statement of the facts giving rise to the action; (3) A short and plain statement of the claim showing that the pleader is entitled to relief; (4) A prayer for relief. Relief in the alternative may be requested.

Id. See also Nav. R. Civ. P. 29–30.

Second, the application must have the signatures of the parties to the peacemaking agreement, waiving their rights to be present when the court considers the application and enters the judgment.¹⁷² Third, when an application is accepted in the court, the judge in charge ensures that relevant laws and rules are followed and may call for a hearing if the circumstances indicate so.¹⁷³ Lastly, the court will summon parties involved and the peacemakers to appear in court. A hearing is held in accordance with the rules of civil procedure.¹⁷⁴

VI. LEARNING FROM THE NAVAJO PEACEMAKING SYSTEM: HOW TO INSTITUTIONALIZE ADR IN THE FORMAL LEGAL SYSTEM OF AFGHANISTAN

Afghanistan can learn a great deal from the way the Navajo developed the Peacemaker Division. Currently, the Navajo judiciary continues to use and develop its traditional dispute resolution mechanisms, and Afghan scholars can observe these efforts and learn from the structure of the Navajo peacemaking division to decipher a way to incorporate Afghan ADR into the formal justice system of Afghanistan.

Like *Jirgas* in Afghanistan, the Navajo Peacemaking division offers many advantages for the Navajo Nation: it is inexpensive, quick, simple, and harmonious with the Navajo ways of life. It also reflects restorative values, meeting the standards of Navajo tradition. Despite the reluctance of Afghan government and justice organizations to integrate and improve customary law into the judicial reform process and reconstruction, Afghanistan can expect similar advantages and should make a suitable space for ADR or customary law in the formal judicial system.

One of the great advantages of the Peacemaker system is the how the Navajo Nation incorporated it into the formal system. When Navajo judges reviewed public concerns about the Navajo court system, identifying the numerous difficulties caused by the incompatibility between traditional

¹⁷² The agreement must include the following specific language:

I (or we) have read the foregoing application for recognition of a peacemaking agreement or resolution or it has been read and interpreted to me (or us). I (we) understand the meaning of the application and I (we) am (are) in agreement that the Court should enter an order or judgment giving legal effect to the peacemaking agreement or resolution attached to this application. By signing my name below, I inform the court that I have no objections to the entry of judgment and I waive my right to be present at the time the court considers the application for entry of judgment.

PEACEMAKING GUIDE, *supra* note 133, at 17.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 18.

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Navajo justice and formal courts, they openly acknowledged the value of the traditional ways. Through this effort and acknowledgement, they forged a relationship between peacemaking and formal courts. Further, by incorporating this same model into the formal system, they formed a partnership with the traditional justice model—instead of treating it as outdated or treating it as a force to overcome. Instead of treating *Jirgas* as a barrier to justice, Afghanistan can and should use this same strategy, acknowledging the true cultural value of the *Jirga* and the ways it answers the dispute resolution needs of rural people.

In light of the Navajo example, this article recommends (a) formally incorporating ADR into the formal legal system of Afghanistan through amendments to the Constitution; (b) enacting a unified statute for the ADR system; (c) building the necessary institutions for facilitating a coordinated system; (d) effecting new legislation that incorporates traditional ADR into the formal system, providing for acknowledgement of opinions and oversight; (e) implementing educational programming to help elders comply with international, Afghan, and Islamic law; and (f) garnering international support for traditional ADR in Afghanistan. The following sections elaborate on these recommendations.

A. *Amending the Afghan Constitution to Acknowledge Traditional ADR as Part of the Formal Justice System*¹⁷⁵

Afghanistan's unitary system is established through the Constitution, creating a central government consisting of the legislature, the judiciary, and the executive.¹⁷⁶ Therefore, in order to maintain or reinforce unity among the various legal methods in Afghanistan, the Constitution should be amended to acknowledge and provide a means to regulate the informal systems. The Navajo structure is slightly different because it is not established through a Constitution. Instead, it incorporates its peacemaking division through the Navajo Nation Code.¹⁷⁷ Regardless, the Navajo have recognized and regulated the Peacemaker Division through the appropriate formal legal channels, which is exactly what Afghanistan must do.

There are currently some constitutional and structural barriers to this kind of incorporation. For example, Article 122¹⁷⁸ of the Afghan Constitution says

¹⁷⁵ An idea explained and developed in Senier, *supra* note 92, at 5.

¹⁷⁶ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, January 26, 2004, Ch. 3, 5, 7 (Afg.).

¹⁷⁷ *Id.*; see also Nielsen, *supra* note 69, at 113.

¹⁷⁸ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, January 26, 2004, Ch. 7, art. 122 (Afg.).

that no law, under any circumstance, can transfer a case from the jurisdiction of the judicial branch to another organ.¹⁷⁹ The Constitution prevents all cases from being removed from the jurisdiction of the judiciary to other non-judicial entities; similarly, the court does not acknowledge the decisions and documentation of other jurisdictions outside the court door. Likewise, the Ministry of Interior officials disfavor the institutionalization and incorporation of the customary law system in the society, and they argue that according to Article 122 of the Constitution, all disputes should be resolved through a formal system.¹⁸⁰ Furthermore, some Afghan officials, particularly judges, assert that traditional ADR methods are unconstitutional—especially when it comes to criminal cases.¹⁸¹

Although these provisions and attitudes suggest an incompatibility between the Constitution and ADR practices, the official practice of the *Loya Jirga* illustrates the deep roots of ADR and models a way that Afghanistan could incorporate other forms of *Jirgas* into the formal system. The *Loya Jirga* (Grand Council) is another form of *Jirga* in Afghanistan.¹⁸² Traditionally, the *Loya Jirga* is invited or made by the Afghan government or by all of the tribes. It is invoked to decide issues of national importance, such as amending the Constitution. According to the history of Afghanistan, the first *Loya Jirga* was held in Kandahar Province in 1707 under the leadership of Mirwais Khan Hotaki, and it was invoked to fight against Safavid rule (Iran empire).¹⁸³

While there was a general consensus by the Navajo Courts to revive the traditional alternative dispute system in the Navajo Nation, Afghanistan may not easily find this same consensus.¹⁸⁴ It will take much more time, coordination, and difficult steps because the Afghan Judiciary may not want to lose its status as an independent branch of the government to share or divide its judicial power with the ADR entities. In light of the Navajo model, this article recommends that the Constitution should be amended to acknowledge ADR as a division of the judiciary branch—not as a legislative body.

Overall, the constitutional amendment should give general recognition to ADR in order to establish the legislature's right to enact a unified code for the ADR process.

¹⁷⁹ *Id.*; Senier, *supra* note 92, at 1. This provision does not apply to establishing special Courts stated in Articles 69 and 78 and 127 of this Constitution and military courts in matters relating to them. Law regulates the structure and authority of these courts.

¹⁸⁰ BARFIELD, *supra* note 53, at 42.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ SHAHMAHMOOD MIAKHEL, THE IMPORTANCE OF TRIBAL STRUCTURES AND PAKHTUNWALI IN AFGHANISTAN; THEIR ROLE IN SECURITY AND GOVERNANCE 8 (2005).

¹⁸⁴ Senier, *supra* note 92, at 3.

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B. *Passing a Unified Statute to Regulate Decisions by Customary ADR Bodies*

In addition to amending the Constitution, Afghanistan can learn from the Navajo peacemaking model for identifying effective language and approaches for rules and regulations that would enable rural Afghanistan to continue to use traditional ways of resolving conflicts. Learning from the Navajo peacemaking division, general principles of peacemaking, guidelines for peacemaking, and guidelines for peacemakers should be consulted and harmonized with the Afghan Constitution and the Afghan traditional ADR practices. These guidelines, adjusted to the Afghan context, can be codified to support just decisions in *Jirgas* and to provide for a means of regulating decisions by customary ADR bodies for the traditional society of Afghanistan.

Notably, this approach is not entirely foreign to Afghan formal courts. In fact, there is currently some legislation that allows judges to follow customary law when there are no clear provisions of law to solve disputes.¹⁸⁵ For example, in some cases, judges can refer to the Public Convention (general tradition) to solve a dispute.¹⁸⁶ Article Two of the Civil Code explicitly states that if there is no provision in the law or in the fundamental principles of the *Hanafi* jurisprudence of Islamic *Shariat*, the court can issue a verdict in accordance with the public convention (general tradition), provided the convention does not contradict the provisions of the law or principles of justice.¹⁸⁷

Moreover, the third clause of Article Four of the Law on Provincial Councils explains that the members of the provincial council have a responsibility to participate in the peace council, which is held to resolve local and ethnic conflicts.¹⁸⁸ In addition to these provisions, there are a number of ways in which Afghanistan can recognize customary law through formal legislation, including recognition by elimination or combination (principles and guidelines), general codification, incorporation, adjustment, and accommodation.¹⁸⁹

While all of these models are instructive for Afghanistan, they “subordinate the customary legal system to that of the state.”¹⁹⁰ Nevertheless, customary law must be drawn in accordance to the elements that meet the

¹⁸⁵ MADANI QANUN [CIVIL CODE] Jan. 5, 1977, art. 2 (Afg.).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ THE LAW ON PROVINCIAL COUNCIL 19 April 2007, art.4 (Afg.).

¹⁸⁹ CHRISTIAN RANHEIM, *Legal Pluralism in East Timor: The Formal Judicial System and Community-based Customary Law*, in THE ROLE OF NON-STATE JUSTICE SYSTEMS IN FOSTERING THE RULE OF LAW IN POST-CONFLICT SOCIETIES 23–25 (U.S. Inst. of Peace ed., 2005).

¹⁹⁰ Senior, *supra* note 92, at 3.

requirements of the Afghan system.¹⁹¹ Besides creating the customary law, Afghanistan must recognize the self-determination needs of most ethnic groups.¹⁹²

At the beginning of the reform process, the Ministry of Justice could incorporate customary law. As stated, a constitutional amendment can give general recognition to customary law while reserving the right of the legislature and courts to interpret that recognition at a later date.¹⁹³ It is necessary to have additional legislation, which could establish minimum rules for procedures to be followed in *Jirgas*—a right to counsel and weighing of evidence, for instance.¹⁹⁴ This may not provide a full guarantee of human rights protection, but it will definitely establish measures for dispensation of justice.¹⁹⁵ Despite these valid concerns, this approach should not halt the process of codification on how the customary law relates to the state system.¹⁹⁶

A comprehensive long-term plan would make room for more functional recognition of customary law within Afghanistan's judicial sector.¹⁹⁷ The legislature should come up with a legislation allowing specific areas of law to fall under customary jurisdiction, while all other areas should fall under state jurisdiction.¹⁹⁸ This could be, for instance, dealing with minor crimes and property disputes. There are a series of topics which need to be included in the new legislation.¹⁹⁹ For example, the right to appeal a customary decision in state court, and that the parties choose the venue.²⁰⁰ Considering that the customary system is male dominated, and gender and human rights issues are not taken seriously, the state should have exclusive jurisdiction over these and other serious matters.²⁰¹

This approach would promote protection for human rights and provide procedural guarantees of fairness.²⁰² Moreover, recognition of customary practices through legislation would help to build trust between the state and customary system and pave the way for identifying the strengths and weaknesses of the two systems.²⁰³ This could also ensure that the customary

¹⁹¹ *Id.* at 5.

¹⁹² *Id.*

¹⁹³ *Id.* For example, South Africa's Constitution of 1996, Chapter 12, recognizes the role of traditional leaders subject to the constitution. S. AFR. CONST. 1996.

¹⁹⁴ Senier, *supra* note 92, at 5.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 6.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Senier, *supra* note 92, at 5.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

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system observes the minimum human rights standards set by the state.²⁰⁴ Finally, delegating adjudicating authority to the customary system, while reserving exclusive jurisdiction in cases of serious crimes (including gender based violence), would decrease the caseload on the state system, preserve cultural autonomy, and promote restorative justice.²⁰⁵

C. Other Legislative Reforms

Current Afghan Law gives some permission and makes some suggestions to accept and consult customary law in the absence of other governing law.²⁰⁶ Reforms that more formally recognize and institutionalize ADR can build on this existing relationship and acceptance. In addition, according to the current legal framework of Afghan law, it is feasible that conciliators could help to resolve court cases in tandem with the formal justice system.²⁰⁷ For example, when there is a dispute between a wife and husband in a marital case, there may be significant interest in solving the problem outside of the courtroom. In fact, the Afghan Civil Code states that it is preferable that the family court devote honest and reliable representatives from both sides of spouses' relatives to find the cause of dispute between spouses and resolve the dispute.²⁰⁸

Similarly, Chapters 7 and 11 of the Commercial Code²⁰⁹ explain that if there are commercial cases between individuals, the court should refer those cases to arbitration by conciliators. In addition, Article Two of the Civil Code succinctly states that if there is no provision in the law or in the fundamental principles of the *Hanafi* jurisprudence of Islamic *Shariat*, the court issues a verdict in accordance with the public convention—general tradition—provided the convention does not contradict the provisions of the law or principles of justice.²¹⁰ Moreover, the third clause of Article Four of the Law on Provincial Councils explains that provincial council members have a responsibility to participate in a peace council, which is held in local and ethnic conflicts to solve problems.²¹¹

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ COBURN, *supra* note 9, at 20.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ COMMERCIAL LAW Sept. 1955, ch. 7 & 11 (Afg.). See also Dempsey & Coburn, *supra* note 1, at 22.

²¹⁰ MADANI QANUN [CIVIL CODE] Jan. 5, 1977, art. 2 (Afg.).

²¹¹ SARAH LISTER, HAMISH NIXON, AFGHANISTAN RESEARCH AND EVALUATION UNIT, PROVINCIAL GOVERNANCE STRUCTURES IN AFGHANISTAN: FROM CONFUSION TO VISION? 6 (2016), <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN024220.pdf> (quoting THE LAW ON PROVINCIAL COUNCIL 19 April 2007, art.4 (Afg.)).

Notably, in 1975, the High Council of the Supreme Court issued a number of "Traditional Dispute Resolution Guidelines."²¹² These guidelines were mainly procedural regulations on how to resolve an informal dispute. Additionally, the guidelines set out eligibility criteria for those resolving disputes and the conditions under which a case can be brought before the court.²¹³ Generally, the justice players do not have knowledge of these guidelines and apparently are not followed anywhere in the country, despite the fact that these laws are still technically valid.²¹⁴

In light of the above, it is feasible that Afghanistan could institutionalize ADR, especially as to those issues where the Afghan law references cultural remedies and resolutions.

There has been significant discussion and research by international society and local NGOs to develop recommendations about how the formal legal system might incorporate and recognize the informal mechanisms in a more systematic way.²¹⁵ While these efforts have not yet been implemented, local Afghan groups, like Welfare Association for the Development of Afghanistan (WADAN) and international organizations like USAID, have brought some innovative ideas to the fore. For example, WADAN is focused on creating a hybrid system in the judicial sector, and advocates that petty and minimal civil disputes and criminal cases should be decided first by local mechanisms, while major incidents will be handled by the formal system.²¹⁶ Other groups have called for a working group of Afghans and international delegates to draft a policy on the relationship between the formal justice system and informal mechanisms.²¹⁷ For example, the unequal treatment of women is a real weakness in the informal system, and this practice must be excluded from the formal system. One controversial issue is whether informal mechanisms should handle any criminal cases. For the most part, it is most reasonable for informal mechanisms to deal only with petty crimes and, in particular, civil aspects (tort) of criminal cases.

D. *Bringing Customary Law into Line with International Human Rights Norms*

As explained in previous sections, many Afghan traditional remedies and solutions violate national and international human rights norms. Practices like

²¹² COBURN, *supra* note 9, at 20.

²¹³ *Id.*

²¹⁴ *Id.* at 20–21.

²¹⁵ *Id.* at 46.

²¹⁶ *Id.*

²¹⁷ *Id.* at 46–47.

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baad and *badal* cannot continue as Afghanistan strengthens the rule of law and works to comply with international standards of justice and human rights. However, these practices have a long cultural history in Afghan rural areas, and the people will not abandon them willingly without a respectful, inclusive, and productive partnership with members from the formal system.

The Navajo guidelines and rules can serve as a helpful model for how to forge this partnership and ultimately guide *Jirga* practice away from some of the unacceptable traditional remedies. As the Navajo modeled through their design and implementation of peacemaker courts, Afghan elders and members of formal courts must work together to create a reasonable set of rules that would guide *Jirga* decisions, and they must cooperate to educate *Jirga* members about expectations for human rights under Afghan and international law. An important piece of this work will involve motivating elders to follow human rights norms, and this will require cooperation between all parties and institutions. It is unlikely that elders will submit to international standards unless they come to see the value of doing so; this can only happen through respectful partnership and education that communicates inclusiveness, respect for traditional ways, and cultural sensitivity.

E. *Institution Building*

The ADR legal system is currently working as a legal institution to support social stability. There are some ADR buildings in some districts, most of which have been built by NGOs, and these buildings are not affiliated with the formal courts in any way.²¹⁸ Afghanistan's judicial reconstruction effort should dedicate resources to building the institutions of its customary system, to promote the relationship between formal and informal courts and to encourage observation of national and international laws.²¹⁹

Although it will be necessary that the customary law practitioners and elders have an appropriate space for making decisions, my recommendation is not that the government and donors should physically construct special courthouses for the customary system; instead, Afghanistan should focus on incorporating the customary system into the country's overall judicial framework. This relationship can be fostered by permitting the application of customary norms in state courts or by establishing a formal, legally recognized relationship between formal and customary courts, subjecting informal courts to state supervision and regulation in a similar manner to the Navajo

²¹⁸ *Id.*

²¹⁹ *Id.* at 6.

peacemaking division, where peacemaking has its own cycle within and under the supervision of the tribal court.

The Ministry of Justice can also support the use of traditional institutions in promoting the development of ADR. ADR can reduce the load on an increasing formal state system by mediating and arbitrating civil and minor criminal cases. The reduction of case load upon formal courts is particularly well-matched to customary law since, for centuries, local *Shuras* and *Jirgas* have been rendering this service to villages.²²⁰

Unlike the Navajo peacemaking division as a sub-structure of the Navajo tribal court, Afghan customary ADR supports formal trials in the rural areas of Afghanistan to resolve land disputes and minor crimes between parties. This is very important because in rural areas many state courts are not established, many laws are yet to be written, and most judges lack professional skills.²²¹ To avoid the legal vacuum which is often noticed in several post-conflict states, it is in the best interest of Afghanistan to maintain law and order in rural areas through supporting customary legal institutions.²²²

F. *Training the Elders that Oversee Customary Bodies*

According to the Navajo peacemaking training programs for nominees, the Peacemaking Program keeps a list of nominees to appoint as peacemakers, and they are supposed to complete different stages of training: introductory, intermediate, and continuation training. This kind of training would be helpful for preventing *Jirga* members from making decisions that violate human rights in the area of national and international laws. Therefore, training elders and other potential *Jirga* members will be essential to improving the legality of decisions.²²³

In addition, ADR practices that violate Islamic law, national law, and international law must be discontinued. To make this change, Afghanistan must train elders on the expected guidelines, rules, and unified codes to harmonize their decisions with national and international laws. From my own experience with the *Jirga* system, I know that most Afghan elders do not have familiarity with national and international laws, and this is one of the main reasons that their decisions continue to violate human rights. Therefore, legal training for elders will be an important component of successful institutionalization of customary ADR.

²²⁰ Senier, *supra* note 92, at 6.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

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Notably, Afghanistan and its global affiliates already offer a wide range of important workshops and legal training programs for elders who are involved in alternative dispute resolutions. These programs could lead the effort on preparing elders for the incorporation of ADR into the formal system, educating them on the requirements of Afghan law so that they may adjust their decisions in accordance with the law—especially in areas like family law, civil law, criminal law, and property law.

Since the 2004 Afghan election, global societies and some NGOs have focused on rehabilitation and improvement of the ADR system in Afghanistan, even though they have not focused on the idea of incorporating ADR into the formal system.²²⁴ In particular, they have offered some legal training for elders to help them acquire general knowledge about Afghan law. These legal workshops have been beneficial. For example, USAID Rule of Law Stabilization-Informal Component (RLS-I) project in Jalalabad City, Nangarhar Province, offered a workshop on property deeds, lease agreements, power of attorney, authority letters, and marriage certificates. One elder reported that he attended many programs in the past, but that this one was particularly effective because they discussed many of the disputes *Jirgas* faced in their villages every day, and the program helped them identify solutions to these disputes.²²⁵ A practical approach to trainings, like this one, would be most useful to active *Jirga* members.

The workshop in Arghandab District, Kandahar Province was another example of a successful program. This program was held for thirty-three senior women and wives of elders to attend a one-day discussion meeting on domestic dispute prevention and resolution.²²⁶ They discussed ways to increase the role of women in, and access to justice, and a group named Spinsary group established in Knadahar that aims to develop conflict resolution among women (women elders).²²⁷ Kandahar women have traditionally had limited access to the public circle to participate in *Jirga* sessions.²²⁸ Generally, males dominate the *Jirga* in Afghan society.²²⁹ Thus, it is a focal point to train the elders who are typically involved to make a decision to avoid violation of human rights in the area of national and international laws. Again, this approach has worked well for improving the

²²⁴ *Id.*

²²⁵ U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, AFGHANISTAN PROGRAM HIGHLIGHTS 5 (2011), <http://reliefweb.int/sites/reliefweb.int/files/resources/Program.pdf>.

²²⁶ *Id.* at 6.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

work that *Jirgas* do, and it can be extended to assist with incorporating ADR into the formal system.

G. *Garnering International and National Support*

Since the first presidential election, which was held on October 9, 2004, the international community has been working in different ways to rehabilitate Afghanistan.²³⁰ One of these projects has been focused on improving and developing the informal justice system as well as to harmonize with the formal justice system of Afghanistan in the rural areas. This kind of support could help with efforts to improve and correct the ADR system in Afghanistan.

The US government has a specific annual budget for improving and developing the Navajo Nation and peacemaking court program.²³¹ In a similar kind of effort, the U.S. and British governments, as well as the World Bank, and other global groups have spent significant funds to help the informal justice system of Afghanistan.²³² One of the major targets of international aid is to work with local communities and improve customary law mechanisms. For example, USAID and other funded NGOs are working to harmonize ADR practices with national and international laws.²³³

Under the Afghan Constitution, local councils should be elected by residents of a village for the purposes of traditional justice, security, and social and economic development.²³⁴ Therefore, the Afghanistan Social Outreach Program (ASOP), which was technically and logistically held by international society, is an example of international support on behalf of the informal justice support program through the help of the local governor and officials. The purpose of this project was to establish the local councils in rural districts.²³⁵ Moreover, international projects that are working for rule of law and, also, ASOP programs that are based for dispute resolution as a subset of local governance.²³⁶ And there are other local organizations that are involved with

²³⁰ RASUL BAKHSH RAIS, *RECOVERING THE FRONTIER STATE: WAR, ETHNICITY, AND STATE IN AFGHANISTAN* 129 (2008).

²³¹ *Fiscal Year 2015 Indian Country Budget Request: An Honorable Budget for Indian Country: Equitable Funding for Tribes* 2015 NAT'L CONGRESS AM. INDIANS 1, http://www.ncai.org/ncai_2014_budget_request.pdf. See also, *Judicial Branch Requesting Funding to Continue Services for Detained Youth*, DINE JUSTICE (Justice Branch of the Navajo Nation, Window Rock, AZ), Apr. 2012, at 8, 10, <http://www.navajocourts.org/PressReleases/Dine-Justice-Vol1Issue1.pdf>.

²³² COBURN, *supra* note 9, at 39–40.

²³³ *Id.*

²³⁴ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, *supra* note 103, art. 26.

²³⁵ COBURN, *supra* note 9, at 40.

²³⁶ *Id.* at 42.

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the informal dispute resolution project.²³⁷ These local NGOs are also financed by international organizations. Nevertheless, they may have better local relations than international organizations, because they are more traditionally aware of, and perhaps more personally invested in, the long-term goals of informal justice.²³⁸ Continued efforts at this kind of collaboration will likely be most effective for ADR projects in the years to come.

VII. CONCLUSION

For centuries, Alternative Dispute Resolution (ADR) has been an effective method of resolving conflict in Afghanistan. Most of this work has been performed by elders in rural areas who form a *Jirga* to quickly solve local problems, without engaging the formal courts or the formal justice system. However, under the Afghan Constitution, decisions from these bodies have no legal effect, except under very special circumstances such as family dispute by negotiation, property disputes, and water disputes in the rural areas. In addition, on occasion these bodies have been known to issue decisions that violate the Islamic Law, the Afghan Constitution, international human rights, and other Afghan laws.²³⁹ Therefore, in order to acknowledge and capitalize on the great value of this system, and to bring its decisions into compliance with Afghan and international law, this article recommends that Afghanistan amend its constitution to incorporate the ADR system into the formal system of justice; to pass a unified statute and codification for ADR; and to train elders, who typically oversee these customary bodies, in the formal laws and policies of Afghanistan and conventions under international law. With these changes, Afghanistan can maintain the benefits it derives from the current system of customary ADR, while protecting the rights of its citizens.

²³⁷ *Id.*

²³⁸ *Id.* at 43–44.

²³⁹ *Id.*

